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CANADA

EXAMINER

GRAYSAY, TAMARA L

ART UNIT	PAPER NUMBER
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3636

SHORTENED STATUTORY PERIOD OF RESPONSE	MAIL DATE	DELIVERY MODE
3 MONTHS	02/15/2007	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

If NO period for reply is specified above, the maximum statutory period will apply and will expire 6 MONTHS from the mailing date of this communication.

Office Action Summary	Application No. 10/765,935	Applicant(s) WILLIAMS, ROGER	
	Examiner Tamara L. Graysay	Art Unit 3636	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 16 January 2007.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-26 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-26 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 16 January 2007 is/are: a) ☐ accepted or b) ☒ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Drawings

1. The drawings were received on 16 January 2007. These drawings are objected to because of the following:

- The section line and the figure number in which the section is depicted should be the same (i.e., A-A should be 4-4 in FIG. 3).

Corrected drawing sheets in compliance with 37 CFR 1.121(d) are required in reply to the Office action to avoid abandonment of the application. Any amended replacement drawing sheet should include all of the figures appearing on the immediate prior version of the sheet, even if only one figure is being amended. The figure or figure number of an amended drawing should not be labeled as "amended." If a drawing figure is to be canceled, the appropriate figure must be removed from the replacement sheet, and where necessary, the remaining figures must be renumbered and appropriate changes made to the brief description of the several views of the drawings for consistency. Additional replacement sheets may be necessary to show the renumbering of the remaining figures. Each drawing sheet submitted after the filing date of an application must be labeled in the top margin as either "Replacement Sheet" or "New Sheet" pursuant to 37 CFR 1.121(d). If the changes are not accepted by the examiner, the applicant will be notified and informed of any required corrective action in the next Office action. The objection to the drawings will not be held in abeyance.

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

2. Claims 1, 5, 8, 12, 15 and 19 are rejected under 35 U.S.C. 102(b) as being anticipated by Klingberg (US-3559338).

Claims 1 and 15: A retainer wall system that is flexibly conformable and adapted to be affixed to the ground in a desired conformed position, comprising: a plurality of discrete

wall segments (edging structure 10; FIG. 2; three blocks 11 form the edging structure 10; 2:42-45), each having releasable coupling means situate at opposed ends thereof to permit releasable interlocked coupling of each wall segments together to form a retainer wall (stakes 22 adjacent apex 20 of adjacent ends of the edging structures 10 as depicted in FIG. 1 and 2 comprise releasable coupling means, as broadly recited, insofar as the claim is not in "means for" language and the abutting nature of Klingberg achieves the function of releasable interlocked coupling of the adjacent edging structures 10 because the wall system of Klingberg is unbroken as depicted in FIGS. 1, 2); each of the said wall segments comprising a plurality of substantially vertical elongate members arranged in parallel, substantially mutually adjacent position, (blocks 11 are vertically elongate members arranged in parallel) each said vertical member having resiliently flexible web means flexibly coupling each said vertical member to an adjacent vertical member so as to permit flexible bending of each said wall segments about a vertical axis therethrough to said desired conformed position (between adjacent blocks are web means in the form of hinge means 12); one or more of said plurality of vertical elongate members having longitudinal bore means extending substantially parallel to said vertical axis (FIG. 3, 5; the stakes 22 extend through blocks 11 which are hollow thereby forming a longitudinal bore, as broadly recited); and elongate ground fixation means (stakes 22), adapted to be inserted through said longitudinal bore means and into the ground (e.g., FIG. 3) so as to retain said wall segments in said desired conformed position.

Claims 5 and 19: The coupling means (stakes 22 and opposing ends of adjacent wall structures) permit interlocked pivotable coupling insofar as the adjacent wall structures are movable relative to each other for positioning in the particular application (FIG. 1). As noted in claim 1 above stakes 22 adjacent apex 20 of adjacent ends of the edging structures 10 as depicted in FIG. 1 and 2 comprise releasable coupling means, as broadly recited, insofar as the claim is not in "means for" language and the abutting nature of Klingberg achieves the function of releasable interlocked coupling of the adjacent edging structures 10 because the wall system of Klingberg is unbroken as depicted in FIGS. 1, 2.

Art Unit: 3636

Claims 8 and 12: Klingberg is a "kit" as broadly recited insofar as the edging structure is used in combination with each other to form a wall as depicted in FIG. 1.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

3. Claims 2, 9 and 16 are rejected under 35 U.S.C. 103(a) as being unpatentable over Klingberg (US-3559338) as applied to claims 1, 8, and 15 above, and further in view of Novak (US-D276494).

Claims 2, 9 and 16: Klingberg discloses a longitudinal bore in the vertical members insofar as the vertical members (blocks 11) are hollow (FIG. 4, 5).

Klingberg lacks the vertical members comprising elongate cylindrical members.

Novak suggests the use of elongate cylindrical members for an edging. It is well settled that the shape of an element would have been a matter of choice which a person of ordinary skill in the art would have found obvious absent persuasive evidence that the particular configuration of the claimed container was significant. In re Dailey, 357 F.2d 669, 149 USPQ 47 (CCPA 1966).

It would have been obvious to one of ordinary skill in the art at the time the invention was made to modify the shape of the angular vertical members of Klingberg to be elongate cylindrical members, such as suggested by the elongate cylindrical members of Novak, as a matter of design choice based on the aesthetic nature and use of the wall system.

4. Claims 3 and 17 are rejected under 35 U.S.C. 103(a) as being unpatentable over Klingberg (US-3559338) as applied to claims 1 and 15 above, and further in view of Gaston (US-6449897).

Claims 3 and 17: Klingberg discloses the wall structure of a molded plastic and the like (1:59-61) but is silent as to the particular type of plastic.

Gaston teaches the use of polyethylene for flexible landscape edging (e.g., 1:50-52). Such an arrangement is suggestion for substituting a known type of plastic to provide a flexible edging. In re Leshin, 227 F.2d 197, 125 USPQ 416 (CCPA 1960) (selection of a known plastic to make a container of a type made of plastics prior to the invention was held to be obvious).

It would have been obvious to one of ordinary skill in the art at the time the invention was made to modify the wall structure of Klingberg to be molded of polyethylene, such as suggested by Gaston, in order to provide a flexible molded structure.

5. Claims 4, 11 and 18 are rejected under 35 U.S.C. 103(a) as being unpatentable over Klingberg (US-3559338) as applied to claims 1, 8, and 15 above, and further in view of Gaston (US-6012254).

Claims 4, 11 and 18: Klingberg is silent as to the particular material used for the ground fixation means (stake 22).

Steel is a known material used for ground fixation means (e.g., FIG. 11; anchoring member 12 may be formed of steel). Such an arrangement is suggestion to form the ground fixation means of Klingberg of steel in order to drive the fixation means into the ground to secure the wall structure to the ground. The selection of a known material based on its suitability for its intended use supported a *prima facie* obviousness

Art Unit: 3636

determination in *Sinclair & Carroll Co. v. Interchemical Corp.*, 325 U.S. 327, 65 USPQ 297 (1945).

It would have been obvious to one of ordinary skill in the art at the time the invention was made to modify the ground fixation means of Klingberg to be steel, such as suggested by the steel ground anchor in Gaston, in order to provide a strong anchor.

6. Claims 6 and 13 are rejected under 35 U.S.C. 103(a) as being unpatentable over Klingberg (US-3559338) as applied to claims 1 and 8 above, and further in view of Novak (US-D276494) and Gaston (US-6449897).

Claims 6 and 13: Klingberg discloses a longitudinal bore in the vertical members insofar as the vertical members (blocks 11) are hollow (FIG. 4, 5). Klingberg discloses the wall structure of a molded plastic and the like (1:59-61) but is silent as to the particular type of plastic.

Klingberg lacks the vertical members comprising elongate cylindrical members having an imitation wood grain thereon and the vertical members of polypropylene or polyethylene plastic.

Novak suggests the use of elongate cylindrical members for an edging. It is well settled that the shape of an element would have been a matter of choice which a person of ordinary skill in the art would have found obvious absent persuasive evidence that the particular configuration of the claimed container was significant. In re Dailey, 357 F.2d 669, 149 USPQ 47 (CCPA 1966).

It would have been obvious to one of ordinary skill in the art at the time the invention was made to modify the shape of the angular vertical members of Klingberg to be elongate cylindrical members, such as suggested by the elongate cylindrical members of Novak, as a matter of design choice based on the aesthetic nature and use of the wall system. The particular pattern on the exterior of the cylindrical members is not a patentable distinction over the prior art device and such an arrangement is a matter of design choice, generally recognized as being within the level of ordinary skill in the art.

Further, Gaston teaches the use of polyethylene for flexible landscape edging (e.g., 1: 50-52). Such an arrangement is suggestion for substituting a known type of plastic to provide a flexible edging. In re Leshin, 227 F.2d 197, 125 USPQ 416 (CCPA 1960) (selection of a known plastic to make a container of a type made of plastics prior to the invention was held to be obvious).

It would have been obvious to one of ordinary skill in the art at the time the invention was made to modify further the wall structure of Klingberg and Novak to be molded of polyethylene, such as suggested by Gaston, in order to provide a flexible molded structure.

7. Claims 7/1, 7/5, 14/8, 14/12, 20/15 and 20/19 are rejected under 35 U.S.C. 103(a) as being unpatentable over Klingberg (US-3559338) as applied to claims 1, 5, 8, 12, 15 and 19 above, and further in view of Rimback (US-D386652).

Claims 7/1, 7/5, 14/8, 14/12, 20/15 and 20/19: Rimback teaches a coupling means (FIG. 1, 2) having a longitudinal bore means which ground fixation means may be inserted therethrough to couple opposed ends of wall segments together in order to prevent the adjacent ends from separating.

It would have been obvious to one of ordinary skill in the art at the time the invention was made to modify Klingberg to include a coupling means having a longitudinal bore means which ground fixation means may be inserted therethrough to couple opposed ends of wall segments together, such as suggested by Rimback, in order to couple opposed ends of the wall segments together to prevent the adjacent ends from separating.

Art Unit: 3636

8. Claims 7/6 and 14/13 are rejected under 35 U.S.C. 103(a) as being unpatentable over Klingberg (US-3559338), Novak (US-D276494) and Gaston (US-6449897) as applied to claims 6 and 13 above, and further in view of Rimback (US-D386652).

Claims 7/6 and 14/13: Rimback teaches a coupling means (FIG. 1, 2) having a longitudinal bore means which ground fixation means may be inserted therethrough to couple opposed ends of wall segments together in order to prevent the adjacent ends from separating.

It would have been obvious to one of ordinary skill in the art at the time the invention was made to modify the Klingberg, Novak, and Gaston combination to include a coupling means having a longitudinal bore means which ground fixation means may be inserted therethrough to couple opposed ends of wall segments together, such as suggested by Rimback, in order to couple opposed ends of the wall segments together to prevent the adjacent ends from separating.

9. Claim 10 is rejected under 35 U.S.C. 103(a) as being unpatentable over Klingberg (US-3559338) and Novak (US-D276494) as applied to claim 9 above, and further in view of Gaston (US-6449897).

Claim 10: Klingberg discloses the wall structure of a molded plastic and the like (1:59-61) but is silent as to the particular type of plastic.

Gaston teaches the use of polyethylene for flexible landscape edging (e.g., 1:50-52). Such an arrangement is suggestion for substituting a known type of plastic to provide a flexible edging. In re Leshin, 227 F.2d 197, 125 USPQ 416 (CCPA 1960) (selection of a known plastic to make a container of a type made of plastics prior to the invention was held to be obvious).

It would have been obvious to one of ordinary skill in the art at the time the invention was made to modify the wall structure of Klingberg and Novak to be molded of

Art Unit: 3636

polyethylene, such as suggested by Gaston, in order to provide a flexible molded structure.

10. Claims 21-26 are rejected under 35 U.S.C. 103(a) as being unpatentable over LeMay (US-4747231) in view of Rodriguez (US-5027551).

Claim 21, 23, 25: LeMay discloses a retainer wall system flexibly conformable comprising: a plurality of discrete wall segments (landscape edging 2) each having releasable coupling means (strip 6 at the right end and slot 10 at the left end) consisting of a protruding spline and corresponding aperture arrangement (spline is strip 6 and corresponding aperture is slot 10); each wall segment comprising a plurality of substantially vertical elongate members (logs 4) arranged in parallel, each vertical member having resiliently flexible web means (e.g., 2:48-53, flexible strip 6) to permit bending (e.g., 2:60-64) about a vertical axis. As for claim 23, the LeMay system is a kit as broadly recited insofar as the wall segment (landscape edging 2) shown can be assembled with other wall segments in a “kit” fashion (e.g., the specification refers to landscape edging sections that are connected together at a joint 18, 2:50-53, “the joint between two sections of landscape edging”). As for claim 25, LeMay is a plurality of wall segments insofar as the wall segments (landscape edging 2) can be assembled with other wall segments (e.g., the specification refers to landscape edging sections that are connected together at a joint 18, 2:50-53, “the joint between two sections of landscape edging”).

LeMay lacks longitudinal bore means and ground fixation means therein.

Rodriguez teaches a ground fixation means (anchorage pin 50) is inherently in a longitudinal bore because the ground fixation means is nailed on the bottom of the vertical member (30). Rodriguez mentions that the ground fixation means (anchorage pin 50) is used in order to prevent movement of the retainer wall system (edging assembly).

It would have been obvious to one of ordinary skill in the art at the time the invention was made to modify one or more of the LeMay vertical members to include a

ground fixation means in a longitudinal bore, such as suggested by Rodriguez, in order to prevent movement of the retainer wall system.

Claim 22, 24, 26: LeMay discloses a retainer wall system flexibly conformable comprising: a plurality of discrete wall segments (landscape edging 2) each having means for releasably coupling (strip 6 at the right end and slot 10 at the left end) a wall segment to an adjacent wall segment; each wall segment comprising a plurality of substantially vertical elongate members (logs 4) arranged in parallel, each vertical member having resiliently flexible web means (e.g., 2:48-53, flexible strip 6) to permit bending (e.g., 2:60-64) about a vertical axis. As for claim 24, the LeMay system is a kit as broadly recited insofar as the wall segment (landscape edging 2) shown can be assembled with other wall segments in a “kit” fashion (e.g., the specification refers to landscape edging sections that are connected together at a joint 18, 2:50-53, “the joint between two sections of landscape edging”). As for claim 26, LeMay is a plurality of wall segments insofar as the wall segments (landscape edging 2) can be assembled with other wall segments (e.g., the specification refers to landscape edging sections that are connected together at a joint 18, 2:50-53, “the joint between two sections of landscape edging”).

LeMay lacks longitudinal bore means and ground fixation means therein.

Rodriguez teaches a ground fixation means (anchorage pin 50) is inherently in a longitudinal bore because the ground fixation means is nailed on the bottom of the vertical member (30). Rodriguez mentions that the ground fixation means (anchorage pin 50) is used in order to prevent movement of the retainer wall system (edging assembly).

It would have been obvious to one of ordinary skill in the art at the time the invention was made to modify one or more of the LeMay vertical members to include a ground fixation means in a longitudinal bore, such as suggested by Rodriguez, in order to prevent movement of the retainer wall system.

Response to Arguments

11. Applicant's arguments filed 16 January 2007 have been fully considered but they are not persuasive.

Claims 1-20

In general, newly added claims 21-26 are evidence that the language in claims 1-20 does not invoke of 35 U.S.C. 112, sixth paragraph, or is not an intention to claim "means for" language.

In response to applicant's argument that the references fail to show "releasable interlocked coupling of each wall segments together, it is noted that the applicant has neither invoked 35 U.S.C. 112, sixth paragraph, nor recited proper "means for" language in claims 1, 8 or 15. As noted in the rejections above, Klingberg discloses the releasable couple connection, as broadly recited, by way of the stakes that extend through the ends of the wall structures (comprised of three adjacent blocks) thus holding them in releasable interlocking connection (FIG. 1).

In response to applicant's argument that Klingberg is not "interlocked" as defined in the Concise Oxford Dictionary, it is noted that the broadest reasonable interpretation is given the claim language, not a dictionary definition of each individual term in the claims. Applicant's reliance on a dictionary definition of the term is narrower than the broadest reasonable interpretation given the term. It is noted that the claim is limited to "coupling means" broadly and that Klingberg discloses a plurality of edging pieces comprised of three blocks (three blocks 11 form the edging structure 10; 2:42-45) coupled together by way of the stakes 22 and adjacent apex 20 of adjacent ends of the edging structures 10. The argument that the functional language that is not part of a "means for" language in claims 1, 8 or 15 is imported patentable weight is not persuasive because as written, the "coupling means" is met by Klingberg and the interlocked statement of intended use is not part of a proper "means for" clause. The claim is limited to a coupling means that is met by Klingberg.

In response to applicant's argument that each Klingberg wall structure 10 can be moved independently and do not perform the same function as the claims, it is noted that

Art Unit: 3636

the claim does not require that the “coupled” wall segments move in any particular manner and the claim is not in proper “means for” language and applicant has not invoked 35 U.S.C. 112, sixth paragraph. It is note that the Klingberg edges are abutted and are a “releasable interlock coupling” of the wall segments insofar as the wall segments cannot move in at least one direction relative to each other.

Conclusion

12. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the date of this final action.

Art Unit: 3636

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Tamara L. Graysay whose telephone number is 571-272-6728. The examiner can normally be reached on Mon - Fri from 8:30am to 5:00pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, David Dunn, can be reached on 571-272-6670. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.



Tamara L. Graysay

Examiner

Art Unit 3636

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